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No. 07-1282

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

SHERRYL ANN SNODGRASS,

Petitioner,

v.

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; IOWA BOARD OF PAROLE; and CHESTER J. CULVER, Governor of Iowa,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the *Ex Post Facto* Clause of the United States Constitution is implicated when the Petitioner was convicted of first degree murder in 1982, sentenced to life in prison without eligibility for parole (unless the Governor of Iowa commutes her sentence to a term of years) and a change in the law enacted in 1995 limits only the frequency of the Petitioner's applications to the Governor for commutation which trigger a review and recommendation on commutation by the Board of Parole, but commutation itself remains a matter of grace vested in the discretion of the Governor?

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OPINIONS BELOW

The Respondents accept the Petitioner's statement regarding the opinions below.

JURISDICTION

The Respondents accept the Petitioner's statement regarding the Court's jurisdiction over this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondents accept the Petitioner's statement regarding the constitutional and statutory provisions at issue in this case, with the addition of the following Iowa statutory references:

At the time of Petitioner Sherryl Ann Snodgrass' commission of the act for which she was convicted of murder in the first degree, a class "A" felony under Iowa law, Iowa Code § 902.2 (1981) read:

> The [Iowa Board of Parole] shall interview a class "A" felon within five years of the felon's confinement and regularly thereafter. If, in the opinion of the board, the person should be considered for release on parole, the board shall recommend to the governor that the person's sentence be commuted to a term of years. If the person's sentence is so

> commuted, the person shall be eligible for parole as provided in [Iowa Code] chapter 906.

Following amendments enacted in 1995 by the Iowa General Assembly, Iowa Code § 902.2 (2007) now reads:

> A person who has been sentenced to life imprisonment under section 902.1 may, no more frequently than once every ten years, make an application to the governor requesting that the person's sentence be commuted to a term of years. The director of the Iowa department of corrections may make a request to the governor that a person's sentence be commuted to a term of years at any time. Upon receipt of a request for commutation, the governor shall send a copy of the request to the Iowa board of parole for investigation and recommendations as to whether the person should be considered for commutation. The board shall conduct an interview of the class "A" felon and shall make a report of its findings and recommendations to the governor.

STATEMENT OF THE CASE

The Respondents generally accept the Petitioner's Statement of the Case with the following corrections and clarifications: At the time Petitioner committed her crime, class "A" felons had no statutory right to directly seek on their own accord a

sentence commutation from the Governor. It was not until 1986, four years after the Petitioner's conviction, that the Iowa Code first expressly authorized inmates to directly petition the Governor themselves for commutation. *See* 1986 Iowa Acts ch. 1112, § 5 (Right of application).

It was not until 1989, seven years after the Petitioner's conviction, that the Iowa Board of Parole amended its administrative rules so as to allow an inmate participating in a Board interview "ample opportunity to express views and present materials." *Compare* 615 Iowa Admin. Code § 3.6 (6/25/1980) *with* 205 Iowa Admin. Code § 14.2(1) (2/22/1989). Prior to that time, the Board of Parole's administrative rules governed the timing of interviews for class "A" felons as represented by the Petitioner, but did not place any procedural restraints upon the Board as to how the interviews were to be conducted.

The subjective and speculative aspect of the commutation process in the State of Iowa is amply illustrated by the difficulty of completing the application form about which the Petitioner complains in her petition. *See* Petition at p. 4. For example, Iowa law does not require that all court costs, fines, and restitution be paid prior to submission and consideration of an application for commutation of life sentence. *See generally* Iowa Code ch. 914 (2007) (Reprieves, Pardons, Commutations, Remissions, and Restorations of Rights); *see* Iowa Code ch. 248 (1981) (predecessor to today's Iowa Code chapter 914). Instead, the Governor alone dictates the application form and

the criteria that must be met before an application for commutation will be granted. Iowa Code § 914.1 (2007); *see* Iowa Code § 248.1 (1981). The Governor may demand the fulfillment of any number of complicated or difficult to fulfill criteria prior to granting a clemency application regardless of whether it is the Board of Parole, the Director of the Department of Corrections, or the inmate herself from which the request for commutation originated.

Lastly, in February 2004, the Petitioner submitted to then Iowa Governor Thomas J. Vilsack an application seeking commutation of her life sentence to a term of years. In a letter dated May 13, 2004, Iowa Board of Parole Chairwoman Elizabeth Robinson acknowledged receipt of the Petitioner's application and stated that it would be docketed and investigated in the order received. The Petitioner's application for commutation of life sentence was in fact investigated and reviewed by the Iowa Board of Parole in the order in which it was received. Governor Vilsack denied the Petitioner's application for commutation of life sentence on November 30, 2006.

REASONS FOR DENYING THE PETITION

I. NO CONFLICT EXISTS BETWEEN THE EIGHTH CIRCUIT'S DECISION AFFIRMING IOWA'S COMMUTATION PROCESS AND THE RULINGS OF THIS COURT RELATING TO THE RETROACTIVE APPLICATION OF AMENDED PAROLE PROCEDURES.

A. *Commutation versus Parole*

The Petitioner repeatedly argues that the Respondents' actions have unlawfully restricted her access to *parole*, and thus delayed her early release from prison. In affirming the District Court's dismissal of the Petitioner's section 1983 complaint, the Eighth Circuit Court of Appeals rightly distinguished between commutation and parole procedures. The Petitioner now challenges the Court of Appeals for recognizing and considering the inherently speculative nature of commutation decisions as opposed to normal parole determinations.

In so arguing, the Petitioner would have this Court believe that commutation of a sentence under Iowa law is merely one additional, but routine, step in the normal parole process. Yet, as this Court has long recognized:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast

> majority of cases. . . . Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem v. Helm, 463 U.S. 277, 300-01 (1983); *see Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

Having been lawfully convicted of a class "A" felony in the State of Iowa based upon her involvement in her husband's murder, the Petitioner's only hope of release from incarceration rests upon receipt of a sentence commutation from the Governor. Iowa Code § 902.1 (1981) ("no person convicted of a class 'A' felony shall be released on parole unless the governor commutes the sentence to a term of years."); *see also* Iowa Code § 902.1 (2007). Consequently, the relevancy of the fact that the Petitioner's eligibility for release from prison is wholly dependent on the Governor's subjective and unconditioned exercise of discretion and mercy cannot be overstated.

Thus, as the Court of Appeals correctly noted, the Petitioner's claim "does not hinge on the availability of parole, but on the availability of a commutation – the only means by which she might become eligible for parole." *Snodgrass v. Robinson*, 512 F.3d 999, 1002 (8th Cir. 2008). Contrary to the Petitioner's efforts to assert otherwise, the Court of Appeals' recognition of this important distinction was not only

principled, but absolutely necessary to correctly analyze the merits of the Petitioner's *ex post facto* claim.

B. *Morales* and *Garner*

The Court of Appeals correctly applied the holdings of *California Department of Corrections v. Morales* and *Garner v. Jones* in determining that the Petitioner could not establish beyond mere speculation that she faced a significant risk of prolonging her term of incarceration as a result of the challenged 1995 statutory amendments. Such conjectural effects based on speculation and attenuated possibilities have been rejected as insufficient as a matter of law to establish an *ex post facto* violation. *See California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995). Thus, no conflict exists between the Court of Appeals' decision and this Court's precedents as alleged by the Petitioner.

The prohibition against the passage of *ex post facto* laws does not require that a criminal's sentence be carried out under the identical legal regime that prevailed at the time of her criminal offense. *Morales*, 514 U.S. at 510 n.6 (1995); *see also Garner v. Jones*, 529 U.S. 244, 250 (2000) ("not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited."). Within the context of parole procedures, a change in law will be deemed illegal when retroactively applied only if the amended procedures create a

significant risk of prolonging an inmate's incarceration. *Garner*, 529 U.S. at 251; *Morales*, 514 U.S. at 509.

As noted by the Court:

> The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem, 463 U.S. at 300-01. Thus, the distinction that the Petitioner would have the Court ignore between commutation and parole proceedings truly impacts whether the Petitioner can predict with certainty a Governor's subjective and unconditioned exercise of discretion in granting sentence commutations.

Despite her arguments to the contrary, the Petitioner is not similarly situated to the inmates who were the subjects of *California Department of Corrections v. Morales* and *Garner v. Jones*. Though Jose Morales and Robert Jones were each serving life sentences, Morales and Jones did not need to await the grant of executive clemency to obtain their release from prison as they were both already eligible for parole under applicable state law. *See Morales*, 514 U.S. at 502; *Garner*, 529 U.S. at 247. Unlike Morales and Jones the Petitioner's only hope, as a

class "A" felon in the State of Iowa, of gaining release from incarceration rests upon her receipt of a sentence commutation from the Governor.

C. Discovery Unnecessary

Furthermore, it is difficult to envision what degree of discovery could possibly provide meaningful insight into any particular Governor's subjective motivations and anticipated actions on any given day so as to enable the Petitioner to establish the required showing under *Garner v. Jones* that her life term of incarceration has somehow been lengthened by the relevant 1995 statutory amendment. *Garner v. Jones* does not compel a District Court or the Court of Appeals to order discovery if that court determines that the speculative nature of an inmate's claims simply cannot be overcome as a matter of law.

The Court of Appeals was absolutely correct in its determination that the "unpredictability of a wholly discretionary grant of commutation in Iowa precludes the Petitioner from demonstrating that the changes in Iowa's law raise a 'significant risk' that she will be denied a commutation she otherwise would have received." *Snodgrass*, 512 F.3d at 1002. Regardless of how often the Petitioner interviews with the Board of Parole or which correctional personnel may support her application, the grant of commutation remains solely rooted in the Governor's subjective and unconditioned exercise of discretion and mercy. *Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987) ("no

substantive predicates are placed upon the governor's discretion in granting a commutation of sentence.").

For this reason, this Court has opined that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981). The same rings true in this case. Mere speculation or hope that the Governor may someday exercise mercy and commute her sentence to a term of years does nothing to alter the fact that the Petitioner was legally sentenced to life without parole. *See Dumschat*, 452 U.S. at 464 ("the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or 'entitlement.'").

Former Governor Vilsack's recent rejection of the Petitioner's pleas for commutation in November 2006 aptly illustrates the speculative and conclusory nature of the Petitioner's allegation that she would have been released from prison by now but for the application of the 1995 statutory amendments. Unlike assigning a parole eligibility date to an inmate serving a mandatory minimum term of years, the Petitioner cannot realistically predict when, if ever, she will benefit from the Governor's exercise of mercy to substitute a lesser term of years for her legally imposed life sentence. Absent proof beyond mere speculation, an *ex post facto* claim is not viable. *See Morales*, 514 U.S. at 509.

II. THERE IS NO OVERWHELMING NEED FOR THE COURT'S GUIDANCE ON THE ISSUE PRESENTED BY THIS CASE.

The Petitioner claims that hundreds of Iowa inmates would benefit from clarification of the constitutionality of the retroactive application of the 1995 amendments to Iowa Code section 902.2 to the state's previously incarcerated class "A" felons. Petition at p. 26. In making such arguments, the Petitioner overstates both the impact and importance of the 1995 statutory amendments to Iowa's prison population. The lack of any litigation in the State of Iowa beyond this case concerning Iowa Code section 902.2 coupled with the void of federal appellate review of amendments to commutation practices demonstrates that there is not a true need for the Court's consideration and guidance on the subject at this time.

A. Minimal Judicial Challenges

In the nearly 13 years since Iowa Code section 902.2 was amended to eliminate periodic Board of Parole interviews for class "A" felons, the Petitioner's case is the only case, reported or otherwise, that counsel could identify that challenged the amended statute on *ex post facto* grounds. Such a lack of litigation by those persons most affected by the 1995 amendments provides compelling evidence that commutation is not viewed as an integral part of Iowa's sentencing scheme and that access to

commutation review has not been impacted to the degree the Petitioner alleges.

In fact, a reasonable argument can be made that the Petitioner has an equal or greater opportunity today than she did in 1982 to have her case for commutation actually presented to and reviewed by the Governor. The version of Iowa Code section 902.2 in effect at the time of the Petitioner's murder conviction only required that the Board of Parole periodically interview class "A" felons. Iowa Code § 902.2 (1981). The Board had no procedural rules to guide how a class "A" felon's status interview was to be conducted. *See* 615 Iowa Admin. Code § 3.7 (6/25/1980). Nor was a class "A" felon guaranteed the right to present information in support of a commutation recommendation. *Id.* The law left to the sole discretion of the Board of Parole which cases, if any, it forwarded to the Governor for commutation consideration. Iowa Code § 902.2 (1981); 615 Iowa Admin. Code § 3.7 (6/25/1980).

All inmate commutation applications are now sent to the Governor for consideration, even those applications that, like the Petitioner's, the Board of Parole recommends be denied. Because the Governor is not bound by the Board's recommendations, those applications failing to gain the Board's approval may still be considered and granted.[1]

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[1] In fact, on January 5, 2007, former Governor Vilsack commuted the mandatory minimum sentence of Dixie Shanahan

(Continued on following page)

The Petitioner is mistaken in her assertion that she is precluded from gaining an interview before the Board of Parole more often than once every decade. Today's law may only allow class "A" felons to submit an application for commutation on their own behalf once every ten years, but the Director of the Department of Corrections retains the authority to do so on an inmate's behalf *at any time*. Iowa Code § 902.2 (2007). Thus, the 1995 law simply shifted from the Board of Parole to the Department of Corrections the authority to bring those commutation applicants who, in its opinion are deserving of extra consideration, to the Governor's attention. If her case for commutation is as meritorious as the Petitioner alleges, further intervention by this Court is unnecessary as the Petitioner should have no problem convincing the Iowa Department of Corrections to submit future applications to the Governor on her behalf as often as deemed appropriate. *See* Iowa Code § 902.2 (2007).

B. No Conflict Among Federal Circuits

A diligent search identified only one reported Court of Appeals decision outside the Eighth Circuit that addressed the merits of an *ex post facto* challenge to commutation procedures. In a case that predates this Court's rulings in *Garner* and *Morales*,

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Duty over the Board of Parole's objections. Letter from Thomas J. Vilsack, Governor of Iowa, to Elizabeth Robinson, Chairperson, Iowa Board of Parole (Jan. 5, 2007) (copy may be accessed at http://editor.learfield.com/mp3/vilsack_letter.pdf).

the Fifth Circuit Court of Appeals found that the repeal of a Louisiana statute that contained provisions pertaining to the process by which a prisoner sentenced to life imprisonment could obtain a sentence commutation did not constitute a violation of the *Ex Post Facto* Clause. *See Dunn v. Maggio*, 712 F.2d 998, 1001-02 (5th Cir. 1983). The fact that only one reported Court of Appeals case in addition to the Petitioner's could be identified relating to an *ex post facto* challenge to revised commutation standards provides further basis to conclude that the Court's direct guidance on this issue is unnecessary at this time.

In a series of unreported decisions, however, the Fifth Circuit has instructed the United States District Court for the Middle District of Louisiana to evaluate whether in view of *Morales* and *Garner* the State of Louisiana's application of amendments to its commutation procedures, including the imposition of a mandatory waiting period to reapply for sentence commutation, constitutes an *ex post facto* violation. *See Howard v. Blanco*, No. 07-30046, 2008 WL 118367 (5th Cir., Jan. 14, 2008); *Sears v. Blanco*, No. 07-30246, 2008 WL 552501 (5th Cir., Feb. 29, 2008); *Mason v. Blanco*, No. 07-30367, 2008 WL 687292 (5th Cir., March 13, 2008). Undoubtedly, these cases will provide the Fifth Circuit Court of Appeals an opportunity to reassess its ruling in *Dunn v. Maggio* and provide its own detailed insight into the applicability of *Morales* and *Garner* to commutation proceedings. It is appropriate for the Court to defer taking up the issue of retroactive application of amended

commutation procedures until such time as the Fifth Circuit decides that *Dunn v. Maggio* should be reversed in view of this Court's recent *ex post facto* pronouncements.

C. Interviews Imperfect Remedy

Perhaps of greatest importance to the present case is the likelihood that a return to the Iowa Board of Parole's former practice of providing qualifying class "A" inmates annual interviews will not actually remedy the shortfalls in the commutation application process of which the Petitioner complains. *See* Petition at pp. 4, 9, 29-30. Because it is the Governor alone who dictates the criteria that must be met before an inmate will be granted a sentence commutation, reverting to the former statutory scheme will do nothing to preclude the Governor from demanding from the Petitioner the fulfillment of any number of factors as a prerequisite to receiving executive clemency including: the payment of all fines, court costs and restitution; collection of relevant court documents and other filings; and the presentation of letters of recommendation from any host of persons including the presiding judge, the prosecutor, and affected victims.

Thus, depending on the subjective policy prerogatives of the presiding chief executive, the Petitioner could face as difficult a time receiving full consideration for commutation as she does now under current Iowa Code section 902.2. Consequently, now, as

before, the Petitioner's only hope of release rests upon receipt of a sentence commutation from the Governor. *See* Iowa Code § 902.1 (1981, 2007).

CONCLUSION

For the above-stated reasons, the Respondents respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Sherryl Ann Snodgrass.

Respectfully submitted,

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